

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIDNEY NAIMAN,
Plaintiff,

v.

TRANZVIA LLC,
Defendant.

Case No. 17-cv-4813-PJH

**ORDER GRANTING MOTION TO
DISMISS**

Before the court is defendant's motion to dismiss the complaint in the above-entitled action for failure to state a claim and lack of personal jurisdiction. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion as follows.

BACKGROUND

Plaintiff Sidney Naiman filed the complaint in this proposed class action on August 18, 2017, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). The sole defendant is TranzVia LLC (TranzVia), a Delaware limited liability company with its principal place of business in Texas. Plaintiff claims that TranzVia does business throughout the United States, and that it "offers various payment technologies for businesses." Cplt ¶ 15.

The TCPA contains prohibitions concerning calls made to wireless telephone lines and to residential telephone lines. The statute provides that "[i]t shall be unlawful for any person within the United States, or any person outside of the United States if the recipient is within the United States

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice –

. . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission

47 U.S.C. § 227(b)(1)(A), (B).

Plaintiff seeks to hold TranzVia vicariously liable for two telephone calls allegedly made in violation of the TCPA by a telemarketer. Plaintiff claims that TranzVia “hired” the telemarketer to act as its agent in marketing its payment services. In the complaint, plaintiff asserts causes of action for violation of 47 U.S.C. § 227(b)(1)(A) and “knowing and willful” violation of § 227(b)(1)(A) (entitling plaintiff to treble damages); and for violation of 47 U.S.C. § 227(b)(1)(B) and “knowing and willful” violation of § 227(b)(1)(B) (entitling plaintiff to treble damages).

Plaintiff alleges that TranzVia’s “strategies” for marketing its payment services included hiring Gordon Rose (“Rose”), described as “an individual who operates a telemarketing company.” Cplt ¶ 17. While plaintiff claims that TranzVia “hired” Rose, however, he does not elaborate and does not explain in what capacity Rose was “hired.” Plaintiff asserts that Rose generated new customers by “use of an automatic telephone dialing system (‘ATDS’) to solicit business.” Cplt ¶ 18. He alleges that Rose uses ATDS equipment that has “the capacity to store or produce telephone numbers to be called, that includes autodialers and predictive dialers, and that plays a prerecorded message once the calls connect.” Cplt ¶ 19.

Plaintiff claims that on June 8, 2017, his cell phone number “was called with a prerecorded message by Mr. Rose's office.” Cplt ¶¶ 22-23. The caller ID showed that the call was from the phone number (270) 594-7041. Cplt ¶ 24. According to plaintiff, “when the call was answered,” there was a lengthy pause and a click followed by silence before a voice came on the line, which plaintiff asserts “indicated that the call was made using an ATDS.” Cplt ¶ 25. Following the lengthy pause and extended silence, “a prerecorded message played words to the effect that the call was being made to sell credit card processing services[,]” and “[t]he called party was instructed to press a button on his telephone for further information.” Cplt ¶ 26.

Rather than hanging up, however, “the recipient pressed the button for further information and was instructed by another prerecorded voice to leave a voice message with a telephone number.” Cplt ¶ 27. Plaintiff asserts that “[s]hortly after leaving his voice message,” he received a call from Brandon Arvizu (“Arvizu”), who “claimed to be with TranzVia” and who “proceeded to try to sell TranzVia products.” Cplt ¶ 28. The number Arvizu is alleged to have called from is (209) 257-6277. Cplt ¶ 29. Plaintiff claims that following the phone call, Arvizu sent him emails from “a TranzVia email address,” again “attempting to sell TranzVia products.” Cplt ¶ 30.

Plaintiff alleges that he received another prerecorded message – this time on his residential phone line – also in June 2017. Cplt ¶ 31. He does not say who he believes this call was from. Again, however, “[w]hen the call was answered, there was a lengthy pause and a click followed by silence before any voice came on the line,” which plaintiff asserts means that the call was made using an ATDS. Cplt ¶ 32. Following the lengthy pause and extended silence, “a prerecorded message played words to the effect that the call was being made to sell credit card processing services[,]” and “[t]he called party was instructed to press a button on his telephone for further information.” Cplt ¶ 33.

Again, rather than hanging up, “the recipient pressed the button for further information and was instructed by another prerecorded voice to leave a voice message with a telephone number.” Cplt ¶ 34. Shortly after leaving a voice message, “[p]laintiff

1 received a call" from Jassan Sanford ("Sanford"), who "claimed to be with TranzVia" and
2 who "proceeded to try to sell TranzVia products." Cplt ¶ 35. As with Arvizu, plaintiff
3 alleges that Sanford called from phone number (209) 257-6277. Cplt ¶ 36. After the
4 phone call, Sanford allegedly sent plaintiff e-mails from "a TranzVia e-mail address" again
5 "attempting to sell TranzVia products." Cplt ¶ 37.

6 Plaintiff asserts that he has never been a customer of TranzVia and that he did not
7 give consent to receive prerecorded calls "from, or on behalf of, TranzVia," and also
8 claims that the calls invaded his privacy and were "annoying" and "harassing." Cplt
9 ¶¶ 20, 39-40. He does not allege that the prerecorded calls were from TranzVia, but
10 rather that the call to his cell phone was from "Rose's office." Nevertheless, he alleges,
11 TranzVia was "legally responsible" for ensuring that Rose complied with the TCPA, even
12 if TranzVia did not itself make the calls. Cplt ¶ 47.

13 Plaintiff does not explain the basis for his belief that the call to his cell phone came
14 from "Rose's office," and does not say who the call to his residential phone was from. He
15 asserts only that after he requested "further information," Arvizu and Sanford each called
16 from the same number and that each sent emails from "a TranzVia e-mail address
17 attempting to sell TranzVia products." Cplt ¶¶ 28-30, 35-37.

18 TranzVia attaches to its motion a copy of a "Marketing Agency Agreement"
19 ("Agreement") dated November 8, 2016, between Arris Holdings LLC ("Arris"), a
20 Delaware limited liability company, and TranzVia. The Agreement, which bears the
21 signatures of Gordon Rose, CEO of Arris, and Paul Nee, CEO of TranzVia, provides that
22 Arris will provide between 175 and 490 sales leads per day to TranzVia. Agreement ¶ 1.
23 The Agreement defines "sales lead" as "at least the name and telephone number of a
24 business prospect who has, according to Arris's audited response data, opted to receive
25 information about merchant processing services of the type offered by TranzVia." Id.

26 Although the Agreement is not specifically referenced in the complaint, TranzVia
27 argues that plaintiff's claims depend on the Agreement because of the allegation
28 regarding the "hiring" of Rose, see Cplt ¶ 17; the allegation concerning TranzVia's

"arrangement" with Rose, which made TranzVia "legally responsible" for ensuring that Rose complied with the TCPA, see Cplt ¶ 47; and the allegation regarding TranzVia's "engaging" Rose to "make calls on behalf of TranzVia's agents to generate new business," see Cplt ¶ 59.

Plaintiff asserts that TranzVia "knowingly and actively accepted business that originated through the illegal telemarketing calls" from Rose. Cplt ¶ 48. He alleges that in hiring a company to make calls on its behalf, TranzVia "manifest[ed] assent to another person . . . that the agent shall act on the principal's behalf and subject to the principal's control." Cplt ¶ 49 (quoting Restatement (Third) of Agency). He alleges that "by accepting these contracts, the company that Rose hired [sic] manifest[ed] assent or otherwise consent[ed] . . . to act" on behalf of TranzVia, and as such, plaintiff contends, Rose and "the company" are agents of TranzVia. Cplt ¶ 50.

Plaintiff claims that TranzVia "had control over Mr. Rose's actions on its behalf." Cplt ¶ 51. For example, plaintiff asserts, TranzVia "limited the types of businesses" that Rose could solicit for TranzVia; it "restricted the geography" within which Rose could promote TranzVia; it "decided whether, and under what circumstances, it would accept a customer" from Rose; it "instructed" Rose with respect to "the volume of calling and the number of leads it would purchase[;]" and it "had day-to-day control" over Rose's actions, including "the ability to prohibit him from using an ATDS to contact potential customers of TranzVia." See Cplt ¶ 51(a)-(e).

Although there are no facts pled to support the allegations in ¶ 51 regarding TranzVia's "control" over Rose's actions, plaintiff asserts that TranzVia "failed to prohibit" Rose from using an ATDS to contact potential customers of TranzVia. Cplt ¶ 52. He alleges that Rose "transferred prospective customer information, including information about [p]laintiff, directly to TranzVia[;]" and claims that because "the company that TranzVia hired" had the ability to "enter consumer information into the seller's sales or customer systems," that company is an "apparent agent of TranzVia." Cplt ¶ 53.

Plaintiff alleges that TranzVia "knew" that Rose was violating the TCPA on its

Plaintiff also notes that TranzVia was sued in Texas in November 2016 for TCPA violations allegedly relating to the conduct of Rose. Cplt ¶ 57 (citing Cunningham v. TranzVia, C-16-0905 (E.D. Tex. Nov. 26, 2016)). Plaintiff claims that TranzVia entered an appearance in the Cunningham case (when it moved to dismiss the original complaint) five months before the June 2017 calls described above, and that TranzVia nevertheless continued to do business with Rose and had him engage in prerecorded telemarketing until August 2017. Cplt ¶ 58. Plaintiff asserts that by engaging Rose to make calls on behalf of TranzVia's agents to generate new business, and by accepting the benefits of the resulting sales of TranzVia's products, TranzVia "ratified" the use of unlawful calls in this case. Cplt ¶ 59.

TranzVia now seeks an order dismissing the complaint for failure to state a claim and for lack of personal jurisdiction. TranzVia argues that there are no facts alleged showing that it is liable for any calls made by Rose, under an agency theory or otherwise. TranzVia also asserts that there are no facts alleged showing that the court has general personal jurisdiction over TranzVia, and that there are also no facts alleged supporting specific personal jurisdiction, because the only alleged violations of the TCPA were committed by Rose, not TranzVia. And, TranzVia adds, even if the court accepts plaintiff's agency theory, there are no facts showing the court has personal jurisdiction over Rose (who in any event is not a defendant).

24 DISCUSSION

25 A. Legal Standards

26 1. Motions to dismiss for failure to state a claim

A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003).

Under the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" Id. at 679. Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

Review is generally limited to the contents of the complaint, although the court can also consider a document on which the complaint relies if the document is central to the claims asserted in the complaint, and no party questions its authenticity. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). That is, where documents are referenced extensively in the complaint, form the basis of plaintiffs' claim, or are subject to judicial notice, the court may consider those documents in the context of a motion to dismiss. United States v. Ritchie, 342 F.3d 903, 908–09 (9th Cir. 2003); see also Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Hal Roach Studios, Inc. v. Richard Feiner & Co.,

Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

2. Motions to dismiss for lack of personal jurisdiction

The party seeking to invoke the federal court's jurisdiction bears the burden of demonstrating jurisdiction. Picot v. Weston, 780 F.3d 1206, 1211 (9th Cir. 2015). When resolving a motion to dismiss under Rule 12(b)(2) on written materials, the court accepts uncontroverted facts in the complaint as true and resolves conflicts in affidavits in plaintiff's favor. Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1223 (9th Cir. 2011). Where the defendant's motion is based on a written record and no evidentiary hearing is held, the plaintiff need only make a prima facie showing of jurisdictional facts. Picot, 780 F.3d at 2011.

The Due Process Clause of the Fourteenth Amendment "limits the power of a state's courts to exercise jurisdiction over defendants who do not consent to jurisdiction." Martinez v. Aero Caribbean, 764 F.3d 1062, 1066 (9th Cir. 2014). Due process requires that the defendant "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 315 (1945) (quotations omitted). Under the "minimum contacts" analysis, a court can exercise either "general or all-purpose jurisdiction," or "specific or conduct-linked jurisdiction." Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)); see Int'l Shoe, 326 U.S. at 316-20.

Under general jurisdiction, a nonresident defendant may be subject to suit even on matters unrelated to his/her/its contacts with the forum. Daimler, 134 S. Ct. at 754-58. To establish general jurisdiction, the plaintiff must demonstrate that the defendant has continuous and systematic contacts sufficient to approximate physical presence in the state. In re W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 741 (9th Cir. 2013). If the defendant is a foreign corporation, the plaintiff must establish that the defendant has "affiliations so continuous and systematic as to render [it] essentially at home in the forum State, . . . i.e., comparable to a domestic enterprise in that State."

Daimler, 134 S. Ct. at 758 n.11 (citation omitted). The paradigm fora for the exercise of general jurisdiction over a corporation are the place of incorporation and the principal place of business, and only in an "exceptional case" will general jurisdiction be available elsewhere. Id. at 760-61 & n.19.

In the absence of general jurisdiction, a court may exercise specific jurisdiction over a defendant if his/her/its less substantial contacts with the forum gave rise to the claim or claims pending before the court – that is, if the cause of action "arises out of" or has a substantial connection with that activity. Hanson v. Denckla, 357 U.S. 235, 250-53 (1958); see also Goodyear, 131 S. Ct. at 2854. The inquiry into whether a forum state may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014).

Specific jurisdiction is analyzed using a three-part test: First, the nonresident defendant must have purposefully directed his activities or consummated some transaction with the forum or a forum resident, or performed some act by which he purposefully availed himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; second, the claim must be one which arises out of or relates to the nonresident defendant's forum-related activities; and third, the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. See Picot, 780 F.3d at 1211. If the plaintiff is successful at establishing the first two prongs, the burden shifts to the defendant to set forth a compelling case that the exercise of jurisdiction would not be reasonable. Id. at 1211-12.

With regard to the first prong, the "purposeful availment" standard and the "purposeful direction" standard are two distinct concepts. Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 672 (9th Cir. 2012). For claims sounding in contract, courts apply the "purposeful availment" analysis, asking whether the defendant has "purposefully avail[ed]" itself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Schwarzenegger v. Fred

Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting Hanson, 357 U.S. at 253);
see Picot, 780 F.3d at 1212.

For claims sounding in tort, courts apply the "purposeful direction" test.
Schwarzenegger, 374 F.3d at 802-03. The plaintiff must show that the defendant
committed an intentional act, expressly aimed at the forum state, causing harm that the
defendant knows is likely to be suffered in the forum state. Calder v. Jones, 465 U.S.
783, 789-90 (1984); Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002).

B. TranzVia's Motion

Plaintiff does not assert a claim of direct liability against TranzVia for violation of
the TCPA, but rather alleges that TranzVia is vicariously liable, because Rose, acting as
TranzVia's agent, violated the TCPA. "[A] defendant may be held vicariously liable for
TCPA violations where the plaintiff establishes an agency relationship, as defined by
federal common law, between the defendant and a third-party caller." Jones v. Royal
Admin. Servs., Inc., 866 F.3d 1100, 1105 (9th Cir. 2017) (quoting Gomez v. Campbell-
Ewald Co., 768 F.3d 871, 877-78 (9th Cir. 2014)).

Plaintiff asserts that the June 8, 2017 call to his cell phone was made by "Mr.
Rose's office." Cplt ¶ 23. However, TranzVia asserts, plaintiff fails to allege facts
sufficient to show that TranzVia can be held vicariously liable for any call made by Rose,
under any theory of agency.

"Agency is the fiduciary relationship that arises when one person (a 'principal')
manifests assent to another person (an 'agent') that the agent shall act on the principal's
behalf and subject to the principal's control, and the agent manifests assent or otherwise
consents so to act." Jones, 866 F.3d at 1105 (citing Restatement (Third) of Agency
§ 1.01). "For an agency relationship to exist, an agent must have authority to act on
behalf of the principal and '[t]he person represented [must have] a right to control the
actions of the agent.'" Id. (quoting Restatement (Third) of Agency § 1.01 cmt. c).

Plaintiff contends that TranzVia is liable under various theories of agency,
including actual authority, apparent authority, and ratification. Plaintiff alleges that

TranzVia is "legally responsible for ensuring that Rose complied with the TCPA" even if TranzVia did not itself make the calls (Cplt ¶ 47); that TranzVia "knowingly and actively accepted business that originated through the illegal telemarketing calls" from Rose (Cplt ¶ 48); that by "hiring a company to make calls on its behalf," TranzVia "manifest[ed] assent" to another person (Cplt ¶ 49); that by "accepting these contracts," the company Rose hired "manifest[ed] assent or otherwise consent[ed]" to act on behalf of TranzVia (Cplt ¶ 50); that TranzVia "had control over" Rose's actions on its behalf (Cplt ¶ 51); that by engaging Rose to "make calls on behalf of TranzVia's agents to generate new business," and by "accepting the benefits of the resulting sales of TranzVia's products," TranzVia thereby "ratified the use of unlawful calls" (Cplt ¶ 59).

To state a plausible claim based on Rose's actual authority, plaintiff must allege facts showing that TranzVia had the right to control Rose and the manner and means of the calls Rose made. See Thomas v. Taco Bell Corp., 583 Fed. Appx 678, 679-80 (9th Cir. 2014). TranzVia argues that the court need not accept as true the bare legal conclusion that it is liable for Rose's acts, and that such an allegation is not sufficient to state a plausible claim for relief under the circumstances, given that plaintiff has not pled a single fact demonstrating that TranzVia actually had control over Rose such that it can be held vicariously liable for any of Rose's purported violations of the TCPA.

Alternatively, plaintiff must allege facts showing TranzVia's vicarious liability under an alter ego theory or principles of apparent authority or ratification. See Thomas v. Taco Bell Corp., 879 F.Supp.2d 1079, 1084-85 (C.D. Cal. 2012); Panacci v. A1 Solar Power Inc., 2015 WL 3750112 at *7 (N.D. Cal. June 15, 2015).

To state a plausible claim under an apparent authority theory, plaintiff must allege facts showing that TranzVia did or said something sufficient to create a reasonable belief that Rose had authority to act on behalf of TranzVia. See Restatement (Third) of Agency § 2.01; see also In re Fresh & Process Potatoes Antitrust Litig., 834 F.Supp. 2d 1141, 1167-68 (D. Idaho 2011). Apparent authority cannot be shown by allegations that the alleged agent "claimed authority or purported to exercise it." NLRB v. Dist. Council of

1 Iron Workers of Cal. & Vicinity, 124 F.3d 1094, 1099 (9th Cir. 1997).

2 To state a plausible claim under a ratification theory, plaintiff must allege facts
3 showing that TranzVia ratified acts taken by Rose by knowingly accepting the benefits of
4 those acts. See Restatement (Third) of Agency § 4.01. However, a principal is not
5 bound by a ratification made “without knowledge of material facts about the agent’s act.”
6 Restatement (Third) of Agency § 4.01 cmt. b.

7 TranzVia contends that plaintiff fails to allege facts sufficient to state a plausible
8 claim under principles of apparent authority or ratification. TranzVia asserts that the only
9 fact that connects the call (by "Mr. Rose's office") to plaintiff's cell phone, and the call to
10 his residential phone, is his allegation that after he left a voicemail in response to the calls
11 indicating he would like to receive additional information, a representative of TranzVia
12 called him. See Cplt ¶¶ 28, 35. TranzVia claims that this allegation, even if taken as
13 true, is insufficient to show that TranzVia controlled, authorized, or even knew about
14 Rose's calls or that TranzVia had any control over the manner or means by which Rose
15 made calls.

16 TranzVia asserts further that plaintiff's claims fail because, pursuant to the
17 November 8, 2016, Agreement between TranzVia and Arris, TranzVia is not liable for
18 Rose's conduct. TranzVia argues that the Agreement makes clear that it did not "hire"
19 Rose, but rather that it had a contractual arrangement with Arris, of which Rose was the
20 CEO. Moreover, TranzVia asserts, the terms of the Agreement make clear that it did not
21 control Arris or the means by which Arris made calls.

22 TranzVia points to the provision in the Agreement stating that "Arris shall have
23 sole and complete discretion as to the messages it transmits in order to obtain potential
24 lead data, as well as the process Arris uses to audit the initial response data before
25 providing leads to TranzVia." Agreement ¶ 11. Further, TranzVia asserts, the
26 Agreement states that the relationship between Arris and TranzVia “shall be that of
27 independent contractors only” and that in performing the Agreement, the parties are
28 acting as independent contractors and “not as an employee or agent of the other[;]” and

1 further, that “the parties shall have no authority, express or implied, to commit, bind, or
2 obligate the other to any third parties.” Agreement ¶ 13.

3 TranzVia also argues that the claims against it should be dismissed for lack of
4 personal jurisdiction. TranzVia contends that there is no general jurisdiction because it is
5 a Delaware LLC with its principal place of business in Texas, and there are no facts pled
6 showing that it engages in continuous and systematic general business contacts that
7 approximate physical presence in California. As for specific jurisdiction, plaintiff alleges
8 that this court has personal jurisdiction over TranzVia "because a substantial part of the
9 wrongful acts alleged in this [c]omplaint were committed in California." Cplt ¶ 5.

10 TranzVia asserts, however, that the only potentially “wrongful acts” alleged in the
11 complaint were committed by Rose and not TranzVia. Further, TranzVia argues, even
12 assuming that it could be held vicariously liable for Rose’s acts, plaintiff has not alleged
13 any facts showing that the court has personal jurisdiction over Rose, the purported agent.

14 In opposition, plaintiff asserts that the complaint adequately alleges that TranzVia
15 is vicariously liable for Rose's telemarketing, under agency theories of actual authority,
16 apparent authority, and ratification. First, plaintiff asserts that the complaint pleads facts
17 sufficient to show that Rose had "actual authority" to make the prerecorded telemarketing
18 calls at issue here, because the complaint alleges that TranzVia controlled specifics of
19 the calls, knew of their illegal nature, and paid for them to continue. Plaintiff also argues
20 that by continuing to pay Rose for leads after their allegedly illegal origins had been
21 brought to its attention via the allegations in the Cunningham lawsuit, TranzVia impliedly
22 conveyed to Rose that it wished him to "keep calm and carry on."

23 Plaintiff concedes that the Agreement includes provisions requiring TranzVia to
24 observe do-not-call requests and to follow FCC regulations, and that it also indicates that
25 Arris is not TranzVia's agent, and that Arris is an independent contractor. Agreement
26 ¶¶ 2, 12-14. However, plaintiff dismisses those provisions as a "wink-wink, see-no-evil
27 defense" which he claims "might have carried the day before Cunningham," which case
28 he claims “undisputedly put [TranzVia] on notice.” According to plaintiff, "[t]he jig was up

1 – or should have been." See Opp. at 7-8.

2 Second, plaintiff contends that TranzVia "donned" Rose with "apparent authority"
3 by granting him access to its customer relationship management ("C.R.M.") System,
4 which would (according to plaintiff) normally be within TranzVia's exclusive control. This
5 argument is not based on any facts pled in the complaint, but rather on the provision in
6 the Agreement that "[o]pt-in Sales Leads will be uploaded into TranzVia's C.R.M. by Arris
7 employees." See Agreement ¶ 1.

8 Finally, plaintiff contends that the complaint pleads facts sufficient to support all
9 elements of a ratification theory of liability, which (according to plaintiff) include illegal
10 telemarketing by Rose (or Arris) on TranzVia's behalf; TranzVia's benefit from the
11 telemarketing; and TranzVia's knowledge of its illegality. In particular, plaintiff asserts
12 that TranzVia was aware of the improper telemarketing by Rose because it was sued in a
13 similar TCPA case – Cunningham – in 2016. Plaintiff contends that the fact that TranzVia
14 was previously sued for improper telemarketing is sufficient to show awareness of
15 illegality, notwithstanding that the case that purportedly supplied that awareness
16 (Cunningham) was filed in a Texas court by a different plaintiff, and was dismissed before
17 any substantive ruling was made by the court.

18 In his second main argument, plaintiff asserts that the court has specific personal
19 jurisdiction over TranzVia. (He appears to have conceded that there is no general
20 jurisdiction.) With regard to the first prong of the specific jurisdiction test, plaintiff
21 contends that TranzVia purposefully directed its activities toward California.

22 Plaintiff argues that TranzVia's acts were intentional, because it designed and
23 implemented an automated telemarketing scheme aimed at numerous states, including
24 California. Plaintiff claims that the Agreement between TranzVia and Arris confirms that
25 TranzVia intended that telemarketing be conducted, and contends that this intention is
26 underscored by the fact that in an effort to "consummate" the transaction, TranzVia
27 placed multiple (two) follow-up telemarketing calls to plaintiff in California.

28 Plaintiff also asserts that TranzVia's acts were expressly aimed at California,

1 because the telemarketing was targeted at plaintiff. Plaintiff claims that TranzVia's
2 telemarketing scheme targeted Californians at California area codes, and that it knew
3 that the calls were being directed to California, where plaintiff resides, and that it engaged
4 in follow-up calls in an attempt to close the leads generated by Rose. Plaintiff contends
5 that TranzVia's acts caused harm that it knew would likely be suffered in California, as
6 TranzVia reasonably should have known that automated telemarketing to California
7 residents would have an impact within California's borders.

8 Second, plaintiff asserts that TranzVia's acts relate to activities in California. He
9 contends that because he would not have been injured "but for" TranzVia's California-
10 related conduct (making the phone calls), the second of the three elements of specific
11 jurisdiction is met. He claims that TranzVia and Rose "instituted and developed the plan
12 for the robocalls at issue here," and that but for TranzVia's paying Rose to make the
13 calls, they would not have been made, and there would have been no invasion of privacy.

14 Third, plaintiff contends that once he has made a prima facie showing of the first
15 two factors, the burden shifts to TranzVia to present a compelling case that the presence
16 of some other consideration would render jurisdiction unreasonable. See Core-Vent
17 Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993). Plaintiff suggests that
18 TranzVia cannot make such a showing, because requiring TranzVia to defend in
19 California would not be unreasonable.

20 The court finds that the motion must be GRANTED. First, with regard to personal
21 jurisdiction, if plaintiff alleged facts showing TranzVia (the sole named defendant) had
22 intentionally made unsolicited calls to plaintiff's cell phone (and residential phone)
23 numbers, both of which have the California area code 925, such facts could show
24 purposeful direction to California such that TranzVia would be reasonably subject to the
25 personal jurisdiction of this court. See, e.g., Ewing v. McCarthy, 2017 WL 4810098 at *3
26 (S.D. Cal. Oct. 25, 2017); Luna v. Shac, LLC, 2014 WL 3421514 at *3 (N.D. Cal. July 14,
27 2014); Heidorn v. BDD Marketing & Mgmt. Co., 2013 WL 6571629 (N.D. Cal. Aug. 19,
28 2013). The burden would then shift to TranzVia to show that it would be unreasonable

1 for it to be subject to jurisdiction in California.

2 Here, however, plaintiff does not allege that TranzVia made the two calls at issue.
3 The complaint asserts that TranzVia "hired" Rose to "generate new customers" for
4 TranzVia to market its payment services. However, the Agreement, which plaintiff does
5 not challenge, and which is attached to TranzVia's motion, is an agreement between
6 TranzVia and Arris. The Agreement bears the signature of Rose, as CEO of Arris, but
7 Rose is not a contracting party (and plaintiff does not allege that he is).

8 Nor does plaintiff directly allege that Rose himself made the disputed calls or that
9 he directed or oversaw the equipment that made the disputed calls. Plaintiff asserts that
10 Rose had a "strategy for generating new customers" which involved the use of an ATDS
11 to solicit business. Cplt ¶ 18-19. He also alleges that TranzVia "accepted business that
12 originated through the illegal telemarketing calls from Mr. Rose," Cplt ¶ 48; that TranzVia
13 "hir[ed] a company to make calls on its behalf," Cplt ¶ 49; that "the company that Mr.
14 Rose hired [sic] 'manifest[ed] assent or otherwise consent[ed] . . . to act' on behalf of
15 TranzVia, Cplt ¶ 50; that "TranzVia had control over Mr. Rose's actions on its behalf,"
16 Cplt ¶ 51; that "TranzVia failed to prohibit Mr. Rose from using an ATDS to contact
17 potential customers of TranzVia," Cplt ¶ 52; and that Rose "transferred prospective
18 customer information, including information about [p]laintiff, directly to TranzVia."

19 In order to demonstrate that the court has personal jurisdiction over TranzVia
20 based on Rose's conduct, plaintiff must put forth evidence showing that Rose is subject
21 to this court's jurisdiction, and that Rose's actions are attributable to TranzVia because
22 Rose was TranzVia's agent with respect to the calls that Rose allegedly made to plaintiff.
23 It is only when the acts of an agent can be imputed to the principal that the court can
24 exercise personal jurisdiction over the principal for those acts. See Piping Rock Partners,
25 Inc. v. David Lerner Assocs., Inc., 2012 WL 5471143 at *8 (N.D. Cal. Nov. 9, 2012) (citing
26 Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 414 (9th Cir. 1977)) ("The
27 Court's jurisdiction over an agent imputes to the principal when the agent's conduct, on
28 behalf of the principal, gives rise to the cause of action.")

But rather than naming Rose and Arris as defendants, plaintiff alleges violation of the TCPA solely on an agency theory, but without pleading facts sufficient to show that Rose and/or Arris were agents of TranzVia. However, as discussed below, plaintiff fails to plead facts showing that TranzVia entered into any arrangement with, or exercised control over, Rose individually. Even ignoring the distinction between Rose individually and Rose's acts as the CEO of Arris (with which TranzVia did have a contract), the terms of the Agreement make clear that TranzVia did not control Arris or the manner or means in which Arris made calls.

In his opposition, plaintiff principally relies on the theory that TranzVia "ratified" Rose's conduct. However, to be liable (and hence subject to personal jurisdiction) for TCPA violations under a ratification theory, the principal must either (1) have actual knowledge of all material facts about the agent's act or (2) should have known of the actual facts because a reasonable person under the circumstances would have investigated further. See Restatement (Third) of Agency §§ 4.06, 4.01 cmt. b; see also Johansen v. HomeAdvisor, Inc., 218 F. Supp. 3d 577, 587 (S.D. Ohio 2016); Smith v. State Farm Mut. Auto. Ins. Co., 30 F.Supp. 3d 765, 779 (N.D. Ill. 2014).

Plaintiff's response fails to show either that TranzVia had actual knowledge or should have known of the actual facts. The Cunningham case is not "evidence" that TranzVia is liable for Rose's calls to plaintiff, because the mere fact that TranzVia was previously sued does not provide factual support for plaintiff's conclusory statements that TranzVia "must have been aware of" Rose's offending conduct and nonetheless cloaked Rose with authority to act for TranzVia and ratified Rose's allegedly offending conduct with respect to plaintiff.

As for whether the complaint states a claim against TranzVia, the TCPA assigns civil liability to the party who "makes" the call. See 47 U.S.C. § 227(b)(1)(A). "[V]icarious liability can provide the basis for liability for a TCPA violation." Thomas v. Taco Bell Corp., 582 Fed. Appx. 678, 679 (9th Cir. 2014). Plaintiff asserts that the complaint adequately alleges agency under theories of actual authority, apparent authority, and

1 ratification.

2 Agency can be established expressly, via a showing of actual authority, or it can
3 be inferred, by finding apparent authority or ratification. Restatement (Third) of Agency
4 §§ 2.01, 2.03, 4.01. Here, plaintiff does not allege facts showing a traditional or classical
5 agency relationship between TranzVia and Rose (who plaintiff seems to be asserting is
6 the person responsible for the recorded phone calls). In order to allege a traditional
7 agency relationship, plaintiff would have to allege facts showing that TranzVia “controlled
8 or had the right to control [the entity responsible for the phone calls] and, more
9 specifically, the manner and means of the [phone call campaign Rose allegedly]
10 conducted.” Thomas v. Taco Bell Corp., 879 F. Supp. 2d 1079, 1085 (C.D. Cal. 2012),
11 aff'd, 582 Fed.Appx. 678 (9th Cir. 2014). “Agency means more than mere passive
12 permission; it involves request, instruction, or command.” Id. (quoting Klee v. United
13 States, 53 F.2d 58, 61 (9th Cir. 1931)).

14 The complaint does not allege any facts showing that TranzVia had any control, or
15 any express or actual authority, over Rose or any associated entity that made the phone
16 calls. A plaintiff must allege facts, not conclusions, and the court need not accept as true
17 unreasonable inferences, unwarranted deductions of fact, or conclusory allegations cast
18 in the form of factual allegations. See, e.g., Sprewell v. Golden State Warriors, 266 F.3d
19 979, 988 (9th Cir. 2001).

20 Plaintiff takes issue with TranzVia's argument that ¶ 51 of the complaint comprises
21 a series of conclusory and unsupported statements that TranzVia had control over
22 Rose's actions on its behalf. Plaintiff argues that the allegations in ¶ 51 of the complaint
23 show that TranzVia had control over Rose's actions on its behalf. However, plaintiff does
24 not point to any facts that support the conclusory allegations in ¶ 51, though he does
25 claim that the Agreement between Arris and TranzVia confirms at least one of them
26 (referring to ¶ 51(d)), as it instructs Rose with respect to the volume of calling and the
27 number of leads TranzVia would purchase ("Arris shall provide to TranzVia one-hundred
28 and seventy-five to three-hundred (175-300) Sales Leads per day. Arris shall provide at

1 least 90% of the daily leads by 4 p.m. Central time.") He does not acknowledge,
2 however, that this provision includes no instruction regarding how Arris is to obtain those
3 leads, and does not even mention Rose.

4 The court finds that allegations in ¶ 51 of the complaint, which plaintiff asserts
5 show that "TranzVia had control over Mr. Rose's actions on its behalf," are insufficient to
6 demonstrate that plaintiff has a plausible claim for relief against TranzVia based on
7 TranzVia's alleged vicarious liability for Rose's acts. For example, the conclusions that
8 "TranzVia limited the types of business [Rose] could solicit," "restricted the geography
9 within which [Rose] could promote TranzVia," "decided whether . . . it would accept a
10 customer from [Rose]," "instructed [Rose] with respect to the volume of calling," and "had
11 day-to-day control over [Rose's] actions" – without any facts showing how TranzVia did
12 those things or how it knew those things, or what facts the allegations are based on – are
13 not facts that allow the court to draw the reasonable inference that TranzVia is vicariously
14 liable for Rose's alleged misconduct. Even the allegation that TranzVia instructed Rose
15 "with respect to . . . the number of leads it would purchase," is not supported by facts, as
16 the contractual provision regarding the number of leads TranzVia would purchase is part
17 of the Agreement between Arris and TranzVia, and Rose is not a party to that
18 Agreement.

19 Moreover, the Agreement clearly provides that, in return for a specified payment,
20 Arris would provide sales leads to TranzVia; that Arris would have "sole and complete
21 discretion as to the messages it transmits in order to obtain potential lead data, as well as
22 to the process Arris uses to audit the initial response data before providing leads to
23 TranzVia[;]" that "[t]he business relationship between Arris and TransVia shall be that of
24 independent contractors only" – and that no party shall act "as an employee or agent of
25 the other[;]" and that each party will comply with all applicable laws and regulations, and
26 "[i]n particular, Arris will act in good faith to facilitate campaign compliance with FCC,
27 FTC, and state regulations until the point of lead delivery," at which point "TranzVia shall
28 become solely responsible and liable for the use of such leads." Agreement ¶¶ 1, 4, 11,

1 13, 14. There are no facts alleged showing that TranzVia controlled Rose (or even that it
2 controlled Arris).

3 Further, plaintiff fails to allege facts sufficient to show either apparent authority or
4 ratification. "Apparent authority holds a principal accountable for the results of third-party
5 beliefs about an actor's authority to act as an agent when that belief is reasonable and is
6 traceable to a manifestation of the principal." Restatement (Third) of Agency § 2.03 cmt.
7 c. "[T]he ostensible authority of an agent cannot be based solely upon the agent's
8 conduct." C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474,
9 480 (9th Cir. 2000). The third party's belief must not only be reasonable, but also
10 "traceable" to the principal's manifestations. See Restatement (Third) of Agency § 2.03
11 (2006).

12 Plaintiff does not reference any facts supporting liability under a theory of apparent
13 authority. Instead, plaintiff simply argues that TranzVia "continued to engage Rose" even
14 after it had entered an appearance in the Cunningham case by moving to dismiss the
15 complaint. Plaintiff appears to be attempting to equate TranzVia's being sued in an
16 earlier lawsuit with having actual knowledge of Rose's alleged wrongdoing in connection
17 with the calls at issue in this case. He argues that the fact that TranzVia "continued to
18 engage Rose" after becoming aware of the Cunningham lawsuit bestowed "apparent
19 authority to violate the TCPA on TranzVia's behalf" on Rose.

20 Apparent authority arises from the principal's manifestations to
21 a third party that supplies a reasonable basis for that party to
22 believe that the principal has authorized the alleged agent to
23 do the act in question. [T]he ostensible authority of an agent
cannot be based solely upon the agent's conduct. The third
party's belief must not only be reasonable, but also "traceable"
to the principal's manifestations.

24 Restatement (Third) of Agency § 2.03. Plaintiff alleges no facts showing that Rose
25 reasonably believed, based on manifestations by TranzVia, that he had the authority to
26 act on behalf of TranzVia in making the calls at issue. To the contrary, the Agreement,
27 which was signed by TranzVia's CEO, clearly provided that no party shall act "as an
28 employee or agent of the other" and that the relationship between Arris and TranzVia

"shall be that of independent contractors only." Generally, an individual acting as an "independent contractor," rather than an agent, does not have the traditional agency relationship with the principal necessary for vicarious liability. See United States v. Bonds, 608 F.3d 495, 505–06 (9th Cir. 2010); see also Jones, 866 F.3d at 1105.

The allegations in Cunningham do not demonstrate that Rose was acting with either actual or apparent authority when he allegedly placed the two calls that plaintiff complains about in the present case. Moreover, there is nothing in the Cunningham complaint that supports plaintiff's theories in this case – there was no mention of Rose in the original complaint, in the first amended complaint, or in the second amended complaint in Cunningham, and it was not until the third amended complaint that the plaintiff put forth any allegation that TranzVia was liable for the actions of Arris Holdings, LLC. TranzVia answered and denied the allegations in the third amended complaint, and the plaintiff voluntarily dismissed the case four months later. Arris never appeared or answered the complaint, and Rose was not named as a defendant.

The fact that TranzVia continued to accept leads from Arris after the Cunningham suit was voluntarily dismissed by the plaintiff, and that TranzVia knew Arris generated those leads by making calls, is not enough to enable the court to infer that TranzVia should be held liable for Rose's acts in this case under an agency theory of apparent authority.

Finally, the allegations regarding Rose's "access" to TranzVia's C.R.M. system – "which would normally be within its exclusive control" – are conclusory and inapposite. There are no facts pled in the complaint showing that TranzVia's C.R.M. system "would normally be within its exclusive control." Nor is that allegation supported by anything in the Agreement, which merely sets forth the method by which Arris was to convey information related to the leads it generated to TranzVia – that is, by "upload[ing] it into TranzVia's C.R.M. system." Agreement ¶ 1.

Plaintiff also fails to allege agency based on a theory of ratification. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done

1 by an agent acting with actual authority. . . . A person ratifies an act by (a) manifesting
2 assent that the act shall affect the person's legal relations, or (b) conduct that justifies a
3 reasonable assumption that the person so consents.” Restatement (Third) of Agency
4 § 4.01. The sole requirement for ratification is a manifestation of assent or other conduct
5 indicative of consent by the principal. Id. cmt. b.

6 Ratification may only occur when the ratifying entity is capable of acting as the
7 other entity's principal. See Restatement (Third) of Agency § 4.04 cmt. b (“[c]apacity to
8 ratify requires that the would-be ratifier have capacity to act as a principal in a
9 relationship of agency”). “Although a principal is liable when it ratifies an originally
10 unauthorized tort, the principal-agent relationship is still a requisite, and ratification can
11 have no meaning without it.” Batzel v. Smith, 333 F.3d 1018, 1036 (9th Cir. 2003). If an
12 agency relationship was not established prior to the unauthorized tort, the continued
13 funding of the other entity is not considered ratification. Id.; see, e.g., Thomas, 582 Fed.
14 Appx. at 680.

15 In order to allege that TranzVia “ratified” Rose’s allegedly improper calls, plaintiff
16 must allege facts sufficient to allow the court to reasonably infer that TranzVia knew that
17 Rose violated the TCPA and that it “knowingly” accepted the benefits of Rose’s violation.
18 But, TranzVia argues, the terms of the Agreement between Arris and TranzVia only
19 require Arris to provide TranzVia with “‘opt-in’ lead data and related services.” See
20 Agreement, Preamble. In doing so, Arris was solely in control of “the messages it
21 transmits in order to obtain potential lead data, as well as the process Arris uses to audit
22 the initial response data before providing leads to TranzVia” and responsible for fully
23 complying with the applicable law. Agreement ¶ 11.

24 Here, plaintiff does not allege the existence of a principal-agent relationship
25 between Rose and TranzVia, nor does plaintiff allege facts showing that TranzVia
26 approved of violations of the TCPA perpetrated by Rose, Arris, or any other entity. Thus,
27 there is no allegation of vicarious liability based on ratification.

28 Vicarious liability may provide a valid theory for relief under the TCPA and for

1 exercising jurisdiction over a defendant that otherwise lacks sufficient contacts with the
2 forum. In this case, however, plaintiff has failed to adequately plead any of the three
3 forms of agency necessary to support a claim of vicarious liability. In addition, having
4 failed to adequately plead liability based on agency, plaintiff cannot show that the court
5 has personal jurisdiction over TranzVia on that basis. See Phan v. Grand Bahama
6 Cruise Line, LLC, 2016 WL 1427648, at *2 (N.D. Cal. Apr. 12, 2016).

7 **CONCLUSION**

8 In accordance with the foregoing, the motion is GRANTED. The dismissal is with
9 LEAVE TO AMEND. Any amended complaint shall be filed no later than January 8,
10 2017. No additional parties or claims may be added without leave of court or stipulation
11 by defendant.

12
13 **IT IS SO ORDERED.**

14 Dated: December 4, 2017



15
16 _____
PHYLLIS J. HAMILTON
United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28